Response of
DISH Network, LLC
To FTC/DOJ *ex parte* submissions

CG Docket No. 11-50

Petitioner, DISH Network, LLC submits this response to the recent *ex parte* notices submitted by the Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") urging an expansive liability standard for the actions of third parties that engage in telemarketing. Specifically, this document responds to the October 20, 2011 letter from Russell Deitch, an attorney with the FTC,[1] and to the October 25, 2011 and October 26, 2011 letters from Lisa Hsiao, an attorney with the DOJ.[2]

The position advanced by both the FTC and DOJ is essentially the same. They contend that the federal common law of agency (1) would be inconsistent with the consumer protection goals of the TCPA; (2) would enable businesses to design their relationships with third parties, via contract, to immunize themselves against liability for unlawful telemarketing (irrespective of their conduct with respect to such third parties); and (3) would make enforcement of telemarketing violations more difficult, so therefore the Commission should relax the plaintiff's burden of proof and place the presumption of liability on businesses.

As discussed in more detail below, the first two reasons advanced are "red herrings" and inaccurate. The latter reason does not provide a legally justifiable basis to shift the burden onto businesses and hold them strictly liable for the actions of others in the absence of an agency relationship. To do so would abrogate common law rights without clear direction from Congress to do so, and thus, would invite more litigation and potential future referrals to the Commission over the standard. Moreover, such drastic measures are unnecessary given that the federal common law of agency – a well-established body of law designed to cover a wide range of contexts – is consistent with the TCPA's consumer protection aims and would impose liability on parties who engage, facilitate, or condone unlawful telemarketing for their benefit.

I. The Federal Common Law of Agency is Consistent with the TCPA's Consumer Protection Goals

The FTC and DOJ articulate concerns that applying the federal common law of agency would thwart the consumer protection goals of the TCPA by allowing and enabling unlawful telemarketing conduct with no real means of recourse by the government or other parties to stop such activity. Without addressing the federal common law of agency factors as set forth in case law, the FTC and DOJ argue that the federal common law of agency is ambiguous in a

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[1] Letter from Russell Deitch, Federal Trade Commission, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 11-50 (Oct. 20, 2011) ("FTC Letter").

[2] Letter from Lisa K. Hsiao, U.S. Department of Justice, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 11-50 (Oct. 25, 2011) ("DOJ Letter"); Supplemental Letter from Lisa K. Hsiao, U.S. Department of Justice, to Marlene H. Dortch, Federal Communications Commission, CG Docket No. 11-50 (Oct. 26, 2011) ("DOJ Letter").

telemarketing context and could pull in state law interpretations that would be confusing. The DOJ and FTC ask the Commission to ignore the federal common law of agency and design a new test based on the DOJ's and FTC's own recommended factors (that are also specifically designed to reduce their burden and advance their position in pending litigation). The merits and objectives of that argument warrant a closer look.

The federal common law of agency is well-established and applied in numerous cases, including Supreme Court precedent, where courts are interpreting third party liability in a federal statute that is intended to have a uniform application, but which does not specify the standard of third-party liability to be applied. There is no reason to conclude that this analysis should only be applied in a copyright or employment law context. The law and courts are not so limited. The key question is whether this well-established test, which is founded in long standing precedent over hundreds of years, rather than on a set of criteria invented by FTC and DOJ, is consistent with the TCPA's consumer protection goals.

As demonstrated below, the federal common law of agency test focuses on whether the principal directed and controlled the manner and means of the agent's conduct at issue, using the factors set forth by the Supreme Court in *Community for Creative Non-Violence v. Reid*, 440 U.S. 730 (1989) ("*CCNV*"). Applying this standard with respect to telemarketing activities supports the consumer protection goals of the TCPA, and strikes a reasonable balance in apportioning legal responsibility between a manufacturer or service provider and the third parties who may sell their products and/or services.

Notably, the factors set forth in *CCNV* are intended to cull facts necessary to gauge whether a principal should be legally responsible for the third party's conduct at issue, and not whether the principal has ever engaged in business generally with the third party. The latter is not an evaluation, but more of a simple litmus test that Congress has not authorized. Given the material consequences that flow from a principal's responsibility for the actions of a third party, the federal common law of agency requires balanced analysis as to the relationship between the principal and the violative conduct by the third party to determine whether legal responsibility (including responsibility for monetary and other penalties) is properly and fairly assigned to the principal – particularly when Congress has not expressed an intent to codify a form of strict third party liability, as is the case with the TCPA.

Thus, as applied in the telemarketing context, the *CCNV* factors require an evaluation of whether:

- *the hiring party's right to control the manner and means by which the product is accomplished (i.e., marketed/sold);*

In other words, does a business control the manner and means by which third parties market and sell the products and services bearing the business's brand, as illustrated through both contract terms and/or overall conduct. If the business directs and controls how the third party markets its product or service (such as by outsourcing telemarketing to a third party call center resulting in violative telemarketing calls), that could be a relevant factor suggesting that the business directs and controls the third party's violative conduct at issue.

In contrast, if the business does not direct and control how and through what means a third party markets the business's branded product or service other than a requirement that such market and sales be done lawfully (such as the case with most manufacturers that put a branded product or service in the stream of commerce, which is then sold by third party sellers), that would be a relevant factor weighing against third-party liability.

Moreover, if the business learns that a third party with whom it does business is engaging in unlawful telemarketing purportedly on the business's behalf, such as through falsely representing that the third party is the business, or engaging in violative calls when selling the business's products or services, and the business fails to take reasonable measures to try and stop such unlawful conduct, depending on the facts, that conduct could be interpreted as approving the unlawful conduct, and thus, tacitly directing the conduct to continue occurring.

The test thus encourages businesses to take reasonable steps in response to becoming aware of such unlawful activity that is conducted in selling their products and services, and to take reasonable proactive measures to identify, detect, and deter unlawful behavior occurring by the third party in the business's name so that it does not find itself in a situation where it might have tacitly approved of unlawful conduct purportedly on its behalf. But the test does not hold a company strictly liable for not preventing the third party's unlawful activity despite taking reasonable proactive measures to reduce the likelihood of such unlawful activity occurring in the absence of an agency relationship. It also does not hold a business strictly liable for a third party's unlawful conduct where a business has no relationship with such third party and cannot reasonably identify or stop such third party's unlawful conduct.

- *the skill required;*
- *the source of the instrumentalities and tools;*
- *the location of the work;*
- *whether the work is part of the regular business of the hiring party;*
- *whether the hiring party is in business;*

In the telemarketing context, these factors would highlight whether the third party's conduct at issue – the *violative* telemarketing conduct – occurred with the business's support, expertise, and/or knowledge, such as by providing the necessary information to develop and implement unlawful telemarketing campaigns, resources, call center and/or phones, telemarketing scripts, and/or housing such telemarketers in the business's own location or allocating third party space under the business's direction and control.

By focusing the inquiry on whether the business facilitated, was aware of, and/or contributed to the third party's unlawful activity, this analysis looks to whether there is a nexus between the business and the unlawful third party activity (as opposed to whether there is any business nexus generally, even if in a context unrelated to telemarketing).

- *the duration of the relationship between the parties;*
- *whether the hiring party has the right to assign additional projects to the hired party;*

- *the extent of the hired party's discretion over when and how long to work;*
- *the method of payment;*
- *the hired party's role in hiring and paying assistants;*
- *the provision of employee benefits; and*
- *the tax treatment of the hired party.*

These factors in the telemarketing context would analyze the relationship between the business and the third party to confirm first whether there is even a business relationship between such parties. For example, the DOJ's and FTC's position is that a business should be held strictly liable for a third party's unlawful conduct even if the business had no relationship with the third party, was unaware of the third party's unlawful conduct, and/or was unable to prevent or stop the third party's unlawful conduct. All of which can and does occur where the consumer only remembers (or inaccurately remembers) which brand or name was referenced in the disputed telemarketing call, or where there is unlawful spoofing by unrelated third parties in an attempt to develop lead generation lists to sell to businesses, or where third parties intentionally try to harm another business by spoofing competitor caller-IDs to tarnish a company's brand and purposefully generate complaints in connection with such company's brand.

These factors also reasonably go to if and how the business controls, or is involved with, the unlawful actions of the third party, and whether the party is being paid for the specific conduct at issue. The more direction and control over such ordinary activities and decisions, including payment for the telemarketing conduct at issue, the more the analysis weighs in favor of third-party liability. The less granular control the business has of a third party's daily responsibilities, the more that illustrates that the third party is acting on its own accord, for its own benefit, and not at the direction and control of the business. Where there is less or no involvement in such activities, such factors would weigh against imposing liability on the business.

In sum, all of these well-established factors of federal common law of agency reasonably apply in a consumer protection context under the TCPA, and would impose liability on parties who engage, facilitate, or condone unlawful telemarketing for their benefit.

II. The Federal Common Law of Agency Would Not Enable Businesses to Immunize Themselves from Unlawful Conduct From Which They Benefit

The FTC and DOJ also proffer that adopting the federal common law of agency, rather than the FTC/DOJ developed test, would result in businesses structuring their relationships with third parties to promote unlawful telemarketing. The FTC and DOJ argue that an agency standard would discourage businesses from requiring third parties to comply with telemarketing laws, because businesses would avoid taking any action that could be seen as "controlling" the third party's conduct. As addressed above, this point is without merit. The federal common law of agency standard fully equips courts to address the circumstance where a business was aware of unlawful telemarketing activity but turned a blind eye to such conduct. Courts are ably positioned and experienced, under the federal common law of agency, to determine whether third-party liability should be imposed, even where a business may attempt by contract to immunize itself from liability. This common law, as demonstrated by *Goodman v. Federal*

Trade Commission, 244 F. 2d 584 (9th Cir. 1957) (a case upon which the FTC relies) provides a court with enough flexibility to determine when it is appropriate to impose third-party liability.[3]

Further, it is not in the best interests of a business to have third parties engage in unlawful telemarketing conduct because such conduct tarnishes a company's brand and reputation, and scares away potential customers. Unwanted and unlawful telemarketing calls are not good for business, and that reality operates as an incentive to take reasonable steps to prevent and stop such conduct from occurring.

At bottom, neither the current legal landscape, nor the federal common law of agency, supports an environment where businesses are encouraged to hide from liability, and willfully blind themselves to unlawful telemarketing by others in their name.

III. The DOJ and FTC's Enforcement Challenges Do Not Justify Strict Third Party Liability Where Other Less Drastic Means Are Available Under the Law

The FTC and DOJ posit their overall argument on concerns that enforcing telemarketing violations is challenging. They argue that this challenge justifies the FCC in creating a new liability standard that would relieve the government and private plaintiffs of their burden of proof (both in pending and future cases) in establishing a TCPA violation beyond simply alleging one occurred, and place the burden of proof instead on businesses so long as their brand or trademark arises in the context of unlawful telemarketing by others. In the FTC's and DOJ's view, this new standard of liability would establish a violation, regardless of the business's lack of knowledge, involvement, control, or extent of compliance measures or monitoring of conduct by third parties with whom they do business. Instead, the FTC and DOJ suggest that those should serve as factors that a business can use to try and rebut liability. That is not the burden of proof under the TCPA as articulated or intended by Congress, and it is not a legally justifiable basis for the Commission to disregard the federal common law of agency in interpreting the scope of the TCPA and its implementing rules.

We note further that the FTC's and DOJ's discussion of presumptions and burdens of proof (along with examples of their view of relevant evidence under the test they designed and propose) is not simply an attempt to create a cause of action under the TCPA, but also to allocate the elements of the claims and defenses under any such cause of action and determine the appropriate proof with respect to each such claim. This is the role of a legislature or a judge.

The fact remains that the "risks associated with importing agency law wholesale into the TCPA" are simply the risks that a plaintiff – whether a government agency or any other party

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[3] The FTC improperly cites *Goodman v. Federal Trade Commission*, 244 F. 2d 584 (9th Cir. 1957) to support the proposition that the FCC can ignore agency principles in determining third party liability under the TCPA. The *Goodman* case, however, addresses a court's discretion in applying agency standards in a "direct aid" context. It does not ignore those standards, adopt a different standard, or suggest that a regulator can invent a standard. *Goodman* involved an individual who recruited sales agents for his deceptively-packaged reweaving course and trained them to employ deceptive sales techniques. The court's conclusion of liability was based upon agency relationships and the doctrine of apparent authority.

prosecuting a TCPA – must bear. Simply because the government has undertaken enforcement proceedings and litigation with respect to telemarketing and has found these proceedings challenging, is no basis to disregard centuries of agency law.

Sincerely,

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November 3, 2011